(21,244.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 448.

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

CORNELL STEAMBOAT COMPANY, CLAIMANT OF STEAM-TUG "IRA M. HEDGES," &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 3, 1908.

1 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE TUG IRA M. HEDGES, HER ENGINES, ETC., Respondent.

Statement.

1908.
Jan. 30. Libel filed.
Feb. 13. Exceptions to libel filed.
Apl. 3. Opinion by Adams, D. J.
Exceptions sustained.
May 11. Final decree filed.
" 19. Notice of appeal filed.
" " Assignment of errors filed.
" 23. Certificate of District Judge under act of March 6, 1891 filed.
June 19. Citation issued.
" 22. Petition of appeal filed.
" " Order allowing appeal filed.
" 25. Original citation with proof of service filed.

2 To the United States District Court for the Southern District of New York:

The libel of the Lehigh Valley Railroad Company against the tug "Ira M. Hedges," her engines, tackle, &c., and all persons intervening for any interest therein, in a cause of collision civil and maritime, respectfully avers:

First. The libellant is a corporation organized and existing under the laws of the State of New Jersey, and is and was at the times hereinafter mentioned in possession of the tug "Slatington" under a charter whereby the libellant manned and victualled the said steamtug.

Second. The tug "Ira M. Hedges" is now within this District and within the jurisdiction of this Honorable Court.

Third. On or about the 7th day of June, 1904, at about 6:10 P. M., the tug "Slatington" left Pier 44, North River, with carfloat "No. 22" alongside on the port side, bound for the Lehigh Valley Railroad Terminal at Jersey City. The said tug was properly manned and equipped and had a lookout who was attentive to his duties stationed forward on top of the cars.

When about amidstream and headed toward the Jersey Shore, the tug "Ira M. Hedges" was seen coming up the River well
3 off on the port side. The "Hedges" had two stone scows in tow, one on each side. In this situation the "Slatington" blew a signal of one whistle; but this signal was not answered by the "Hedges," which continued on her course. The "Slatington," receiving no answer, and seeing that the "Hedges" was not changing her course, was stopped, alarm whistles were blown, and the engines

were put in reverse motion; but the starboard corner of the scow "Helen," on the starboard side of the "Hedges," collided with the port corner of float "No. 22," damaging the scow and causing some damage to the guard rail on carfloat "No. 22."

The tide at the time was about high water slack, and the wind light from the southwest.

Fourth. Thereafter the Rockland Lake Trap Rock Company, owner of the scow "Helen," began an action in the Supreme Court of New York for Rockland County against the libellant, to recover the damages to the scow "Helen" caused by said collision. The said action came on for trial before Mr. Justice Kelly and a jury; and after hearing the evidence, a verdict was rendered for the Lehigh Valley Railroad Company. The cause was thereafter appealed by the owner of the "Helen" to the Appellate Division, for the Second Department, and such proceedings were had that the Appellate Division thereafter reversed the order dismissing the complaint, and remanded the cause for a new trial.

4 Thereafter the cause came on for a new trial before Mr. Justice Morschauser and a jury, and such proceedings were had that a verdict was rendered in favor of the plaintiff and against the libellant herein for the damages sustained by the scow "Helen," and thereafter the costs were taxed and judgment entered on June 10, 1907, against the libellant herein for the damages sustained by the scow "Helen," with interest and costs, in the sum of Twelve hundred and nine and 31/100 Dollars ($1209.31), which judgment the libellant thereafter paid.

The libellant expended in defending said action in counsel fees, witness fees and other expenses, the sum of Seven hundred and nineteen Dollars ($719.00).

Fifth. The said collision and the damages consequent thereon were caused or contributed to by the negligence of the tug "Ira M. Hedges," or those in charge of her navigation, in the following, among other particulars which will be pointed out at the trial:

I. In not having any, or any proper, lookout.

II. In not answering the one whistle signal of the "Slatington."

III. In that, having the "Slatington" on her starboard side, and the vessels being on crossing courses, she did not keep out of the way.

IV. In that she did not stop and back in time to avoid a collision.

5 Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue out of and under the seal of said Court against the steamtug "Ira M. Hedges," her engines, boilers, tackle, &c., and that said steamtug, her engines, boilers, tackle, &c., may be seized and sold to pay the amount of the claim set forth in this libel, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper.

ROBINSON, BIDDLE & BENEDICT,
Proctors for Libellant.

6 STATE OF PENNSYLVANIA. *County of Philadelphia, ss:*

D. G. Baird, being duly sworn, says that he is the Secretary and an officer of the Lehigh Valley Railroad Company, the corporation libellant in the above-entitled suit. That the foregoing libel is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by the libellant is because the libellant is a corporation, and the grounds of deponent's belief as to all matters in said libel not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject-matter of this suit and information acquired by deponent in course of his duties as an officer of the corporation libellant in this suit.

D. G. BAIRD.

Sworn to before me this 27th day of January, 1908.

[SEAL.] J. WM. ROBBINS,
Notary Public.

My Commission expires March 4, 1911.
Prothonotary's certificate attached.

7 [Endorsed:] 50-169 U. S. District Court, Southern District of N. Y. The Lehigh Valley Railroad Company Libellant *vs.* The Tug "Ira M. Hedges" Claimant. Libel. Robinson, Biddle & Benedict, Procts. for L'b't. No. 79 Wall Street, Borough of Manhattan, New York City. Filed Jan. 30th, 1908.

8 District Court of the United States for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY
vs.
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, TACKLE, &C.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court, upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this Court.

Wherefore, this claimant prays that the libel herein be dismissed with costs.

CORNELL STEAMBOAT COMPANY,
Claimant.

By S. D. CAYKENDALL, *Pres't.*

AMES VAN ETTEN,
Proctor for Claimant.
Rondout, City of Kingston, N. Y.

9 STATE OF NEW YORK, *County of Ulster, ss:*

S. D. Caykendall, being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the claimant in this action; that he has read the foregoing Exception and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by claimant, is, the claimant is a corporation and deponent is an officer thereof, to-wit: President.

S. D. CAYKENDALL.

Sworn to before me, this 7th day of February, 1908.

HERMAN T. WOOD,
[SEAL.] *Notary Public.*

[Endorsed:] 50-169 U. S. District Court, Southern Dist. of N. Y. Lehigh Valley Railroad Company, *vs.* The Steamtug "Ira M. Hedges," her engines, &c. Copy Exception to Libel. Amos Van Etten, Proctor for Claimant, Kingston, N. Y. Filed Feb. 13th 1908.

10 United States District Court, Southern District of New York.

THE LEHIGH VALLEY RAILROAD COMPANY
against
THE TUG IRA M. HEDGES, HER ENGINES, ETC.

Admiralty.—Exception to Jurisdiction.—No Jurisdiction exists to enforce contribution from a joint tort-feasor where the common law remedy has been successfully invoked against another, especially where the latter has failed to avail himself of provisions in the state law for bringing in the party now sought to be made partly liable.

Robinson, Biddle & Benedict for libellant.
Amos Van Etten for Respondent.

ADAMS, *J.:*

This action was brought by the Lehigh Valley Railroad Company against the tug Ira M. Hedges, upon a cause of action stated in the libel as follows:

"Third. On or about the 7th day of June, 1904, at about 6:10 P. M., the tug 'Slatington' left Pier 44, North River, with carfloat 'No. 22' alongside on the port side, bound for the Lehigh Valley Railroad Terminal at Jersey City. The said tug was properly manned and equipped and had a lookout who was attentive to his duties stationed forward on top of the cars.

When about amidstream and headed toward the Jersey Shore, the tug 'Ira M. Hedges' was seen coming up the River well off on the port side. The 'Hedges' had two stone scows in tow, one on each

side. In this situation the 'Slatington' blew a signal of one whistle; but this signal was not answered by the 'Hedges,' which con-
11 tinued on her course. The 'Slatington,' receiving no answer, and seeing that the 'Hedges' was not changing her course, was stopped, alarm whistles were blown, and the engines were put in reverse motion; but the starboard corner of the scow 'Helen,' on the starboard side of the 'Hedges,' collided with the port corner of float 'No. 22,' damaging the scow and causing some damage to the guard rail on carfloat 'No. 22.'

The tide at the time was about high water slack, and the wind light from the southwest.

Fourth. Thereafter the Rockland Lake Trap Rock Company, owner of the scow 'Helen,' began an action in the Supreme Court of New York for Rockland County against the libellant, to recover the damages to the scow 'Helen' caused by said collision. The said action came on for trial before Mr. Justice Kelly and a jury; and after hearing the evidence, a verdict was rendered for the Lehigh Valley Railroad Company. The cause was thereafter appealed by the owner of the 'Helen' to the Appellate Division, for the Second Department, and such proceedings were had that the Appellate Division thereafter reversed the order dismissing the complaint, and remanded the cause for a new trial.

Thereafter the cause came on for a new trial before Mr. Justice Morschauser and a jury, and such proceedings were had that a verdict was rendered in favor of the plaintiff and against the libellant herein for the damages sustained by the scow 'Helen,' and thereafter the costs were taxed and judgment entered on June 10, 1907, against the libellant herein for the damages sustained by the scow 'Helen,' with interest and costs, in the sum of Twelve hundred and nine and 31/100 Dollars ($1209.31), which judgment the libellant thereafter paid.

The libellant expended in defending said action in counsel fees, witness fees and other expenses, the sum of Seven hundred and nineteen Dollars ($719.00).

Fifth. The said collision and the damages consequent thereon were caused and contributed to by the negligence of the tug 'Ira M. Hedges,' or those in charge of her navigation, in the following, among other particulars which will be pointed out at the trial:

I. In not having any, or any proper, lookout.

II. In not answering the one whistle signal of the 'Slatington.'

III. In that, having the 'Slatington' on her starboard side, and the vessels being on crossing courses, she did not keep out of the way.

IV. In that she did not stop and back in time to avoid a collision.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court in cases of
12 admiralty and maritime jurisdiction may issue out of and under the seal of said Court against the steamtug 'Ira M.

Hedges,' her engines, boilers, tackle, &c., and that said steamtug, her engines, boilers, tackle, &c., may be seized and sold to pay the amount of the claim set forth in this libel, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper."

The Cornell Steamboat Company appeared in the action as claimant of the Hedges, as owner in possession, and filed an exception to the libel as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court, upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this Court.

Wherefore, this claimant prays that the libel herein be dismissed with costs."

While the libel on its face would seem to claim a right to recover what it has been obliged to pay, yet it is urged that it only seeks contribution because the Hedges was in fault as a joint tort-feasor and urges that although the action could not be maintained at common law, the equitable powers of the admiralty are sufficient to give jurisdiction and create a right of recovery should the Hedges be found, upon trial, to have been a participant in the wrong done. Certain authorities have been cited to support the contention, viz: *The Mariska*, 100 Fed. Rept. 500, 107 *Id.* 989; *Erie Railroad Co. v. Erie and Western Trans. Co.*, 204 U. S. 220. Those, however, were admiralty cases and they do not pretend to give admiralty jurisdiction to correct injustice claimed to have arisen through defects in the common law system, to which a party has a constitutional right in marine matters, not actions *in rem*, as well as in others, to resort.

13 It is contended that the common law system is so deficient that a party may recover there against a single wrongdoer, where there is another, or others, equally culpable, without any right of contribution. It is true that an injured person may recover from any one of several joint tort-feasors, if no attempt is made to reach the others but it seems too much to say that there is no right to bring in others. On the contrary, it is provided in The New York Code of Civil Procedure as follows:

§ 452. (Am'd, 1901.) When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in the real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

* * * * * * *

"§ 723. (Am'd, 1877, 1900.) Amendments by the court, disregarding immaterial errors, etc.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended
14 or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial."

These sections have recently been before the New York Court of Appeals in *Gittleman v. Feltman*, 191 N. Y. 205. In an action to recover for personal injuries, an order was made permitting the plaintiff to bring in an additional defendant, which it claimed was a joint tort-feasor with the other defendants. An appeal was taken, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1907. The court of appeals said (209, 210):

"The questions certified in this case are:

First. 'Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?'

Second. 'Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the *power* to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?'

The granting of a motion of this character rests in the sound discretion of the court. It may grant in the furtherance of justice, on such terms as it deems just. The jurisdiction of this court is limited to the review of questions of law, and it, therefore, cannot review the discretion of the Special Term of Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs."

It would appear, therefore, that in this state at least, the common law courts are not so deficient in power that it is necessary for parties to resort to a court of admiralty to secure justice in a case of this kind.

15 But suppose that justice can be better reached in a court of admiralty, does that give a litigant a right to resort to it in all events? It is doubtless true, that an admiralty judge is better qualified to determine controverted questions of fact and law in a complicated collision case, for example, but that does not prevent the common law courts from finally deciding questions of that nature, according to their methods, by actions *in personam*.

In Schoonmaker *v.* Gilmore, 102 U. S. 118, it was said (119):

"The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, *id.* 555; *The Belfast*, 7 *id.* 624; *Leon v. Galceran*, 11 *id.* 185; and *Steamboat Company v. Chase*, 16 *id.* 522. The Judiciary Act of 1789 (1 Stat. 73, Sect. 9), reproduced in sect. 563, Rev. Stat., par. 8, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied."

The principle is well established that where a court obtains jurisdiction of a cause of action, it retains it, to the exclusion of all other courts, to the end. The libellant here seeks to create a right, which apparently does not exist and never has existed. The respondent had a right to invoke the common law remedy. In the trial of the action therein, the defendant was justified in contending, as it (now the libellant here) seeks to establish, that the

16 negligence was partly imputable to the tug Hedges. In order to recover in the state court, it was necessary to show some negligence on the part of the Slatington. Evidently the jury was finally convinced of the latter's fault, hence the verdict, which is made the basis of the claim here. It seems to be an injustice that the Hedges, or her owner, if she was in fault as alleged, should not respond for a part of the loss but the libellant failed to resort to means which the state law provided for bringing in the other defendant and I do not think it is now in a position to invoke the jurisdiction of this court to enforce contribution. If that was not attainable in the common law proceeding, it was an incident of the methods prevailing there and cannot be made the basis for a resort to admiralty.

The exception is sustained.

Apl. 3/08.

[Endorsed:] U. S. Dist. Court Southern District of New York. The Lehigh Valley Railroad Co. *vs.* The Tug Ira M. Hedges Engines etc. Opinion Adams, J.

17 At a Stated Term of the District Court of the United States of America for the Southern District of New York, held at the Court Rooms in the Post Office Building Borough of Manhattan, New York City, N. Y., on the 11th day of May, 1908.

Present: Hon. George B. Adams, District Judge.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE TUG IRA M. HEDGES, HER ENGINES, TACKLE, &C.; CORNELL STEAMBOAT COMPANY, Claimant-Respondent.

The above named libellant having on the 29th day of January, 1908, filed a libel in this court against the tug Ira M. Hedges, her engines, tackle, &c., and the Cornell Steamboat Company, owner of said steamtug, having on the 13th day of February, 1908, filed in the Clerk's office of said court a claim for said tug and a special appearance for the purpose of excepting to the libel, and on the same day having duly filed an exception to such libel in the following terms, to wit: "The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this court, upon the ground that the same does not state a cause of action and the matters therein set forth are not within the jurisdiction of this court;".

18 and such exception having been brought on for hearing on the pleadings before this court on the 17th day of March, 1908; after hearing Amos Van Etten, proctor for respondent-claimant, and Robinson, Biddle & Benedict, proctors for libellant, and due consideration having been had:

It is ordered, that the exception to the libel on the ground that the Court has no jurisdiction be and the same hereby is sustained, and it is

Further ordered, adjudged and decreed: that the libel be and is hereby dismissed on the ground the court has no jurisdiction.

GEO. B. ADAMS.

[Endorsed:] 50-169 U. S. District Court Southern District of New York Lehigh Valley Railroad Company Libe't *vs.* Tug "Ira M. Hedges," &c. Final Decree. Robinson Biddle & Benedict Proc's for Libe't Filed May 11 1908.

19 United States District Court for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

SIRS: Please take notice that the libellant, Lehigh Valley Railroad Company, hereby appeals to the Supreme Court of the United States, from the final decree of this Court, dated the 11th day of May, 1908, and entered on the said day in the office of the Clerk

of this Court, and from each and every part of the said decree.
Dated, New York, May — 1908.
Yours &c.,

ROBINSON, BIDDLE & BENEDICT,
Proctors for Libellant, Lehigh Valley Railroad Co.

To Thomas Alexander, Esq., Clerk of the United States District Court, for the Southern District of New York.
Amos Van Etten, Esq., Proctor for claimant.

(Endorsed:) Notice of Appeal U. S. District Court. S. D. of N. Y. Filed May 19, 1908.

20 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

The Lehigh Valley Railroad Company, libellant herein, feeling itself aggrieved by the final decree in the above-entitled suit, entered in the Office of the Clerk of the United States District Court for the Southern District of New York on the 11th day of May, 1908, does hereby appeal from said order and judgment to the Supreme Court of the United States for the reasons specified in the assignments of error filed herewith, and it prays that this claim may be allowed, and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.
Dated New York, June 17 1908.
Yours &c.,

ROBINSON, BIDDLE & BENEDICT,
Proctors for Lehigh Valley Railroad Company,
79 Wall St., Borough of Manhattan, New York City.

21 The foregoing appeal is granted, and the claim on appeal herein is allowed.
Dated New York, June 17, 1908.

GEO. B. ADAMS,
United States District Judge.

Endorsed: Petition and order allowing appeal filed June 22, 1908.

22 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

Bond on Appeal.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty Street, Borough of Manhattan, City County and State of New York, is held and firmly bound unto the above-named Cornell Steamboat Company, in the sum of Two hundred and fifty Dollars ($250.00), lawful money of the United States, to be paid to the said Cornell Steamboat Company, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 17 day of June, in the year of our Lord One Thousand nine hundred and eight.

Whereas the above-named Lehigh Valley Railroad Company has prosecuted its appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit by the
23 District Court of the United States for the Southern District of New York, and filed in the office of the Clerk of the said Court on the 11th day of May, 1908.

Now therefore the condition of this obligation is such that if the above-named Lehigh Valley Railroad Company shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, and shall abide by and perform any decree which may be rendered by the Supreme Court of the United States or on mandate of the Supreme Court of the United States by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:
GEORGE E. HAYES, *Attorney in Fact.*

[Seal of The United States Fidelity and Guaranty Company.]

Sealed and delivered in the presence of:
WILLIAM F. ALLEN.

24 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

We Will Bond You.

[Vignette.]

Fidelity, Judicial, Burglary, Contract.

STATE OF NEW YORK, *County of New York, ss:*

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Lehigh Railroad Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Lehigh Valley Railroad Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[Seal of U. S. Fidelity & Guaranty Co.]

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 17 day of June 1908.

[Seal of Notary.]

DANIEL C. DEASY,
Notary Public, New York County.

25 [Endorsed:] 50-169 U. S. District Court, Southern District of N. Y. Lehigh Valley Railroad Company Libellant *vs.* Steamtug "Ira M. Hedges" her engines etc. Cornell Steamboat Company Claimant. Copy Bond on Appeal and approval by District Judge. Robinson, Biddle & Benedict, Proctors for Libellant,

No. 79 Wall Street, Borough of Manhattan, New York City. The within bond is hereby approved as to form and sufficiency of the surety Dated June 19 1908 Geo. B. Adams U. S. D. J. Filed June 22, 1908 U. S. District Court S. D. of N. Y.

26 United States District Court for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

The Libellant, Lehigh Valley Railroad Company, by Robinson, Biddle & Benedict, its proctors, assigns error to the final decree entered herein, on the ground that the learned Judge erred

In Finding:

First. That under the laws of the State of New York one joint tort feasor may bring in another.

Second. That there was no jurisdiction in admiralty to enforce contribution from the joint tort feasor where the common law remedy has been successfully invoked against the joint tort feasor seeking contribution.

Third. That a final decree should be entered dismissing the libel for want of jurisdiction.

In not Finding.

Fourth. That under the Laws of the State of New York one joint tort feasor cannot implead other joint tort feasors.

Fifth. That jurisdiction exists in admiralty to enforce con-
27 tribution against joint tort feasors, although the common law remedy has been successfully invoked against the joint tort feasor seeking contribution; and

Sixth. In not overruling the exceptions to the jurisdiction and requiring the claimant to answer the libel.

ROBINSON, BIDDLE & BENEDICT,
Proctors for the Libellant, Lehigh Valley Railroad Co.

(Endorsed:) Assignments of Error. U. S. District Court S. D. of N. Y. Filed May 19, 1908.

28 UNITED STATES OF AMERICA,
Southern District of New York, ss:

LEHIGH VALLEY RAILROAD COMPANY, Libellant-Appellant,
vs.
THE TUG IRA M. HEDGES, Appellee.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 26 day of May in the year of our Lord one thousand nine hundred and eight and of the Independence of the said United States the one hundred and thirty second.

[Seal District Court of the United States, Southern District of N. Y.]

THOMAS ALEXANDER, *Clerk.*

29 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
vs.
TUG "IRA M. HEDGES," HER ENGINES, ETC.

Certificate.

I, George B. Adams, Judge of the District Court of the United States, for the Southern District of New York, do hereby certify that the libel herein was dismissed by me for the reason that the claimant of the tug "Hedges" appeared herein specially, and filed exceptions to the libel as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this court;" and that the said exceptions came on regularly to be heard before me, and the claimant of the tug "Hedges" did urge that the United States District Court sitting as a Court of Admiralty had no jurisdiction to proceed to determine the matters alleged in the said libel, and had no jurisdiction over the cause of action set forth in the allegations of said libel; and

I do certify that the libel herein was dismissed and final
30 decree given for the claimant of said Steamtug "Ira M. Hedges" solely because I deemed that the United States District Court sitting as a Court of Admiralty had no jurisdiction to enforce contribution between joint tort feasors where the common law remedy had been successfully invoked against the joint tort feasor

seeking to enforce the contribution, and therefore had no jurisdiction to proceed and determine the cause set forth in the libel, and for no other reason.

Copies of the pleadings, the opinion and the final decree are hereto attached and made a part of this certificate.

This certificate is made in conformity with the Act of Congress of March 3, 1891, Chapter 517.

Dated, New York, May 26, '08.

GEO. B. ADAMS,
United States District Judge.

31 [Endorsed:] U. S. District Court, Southern Dist. of N. Y. Lehigh Valley Railroad Co. Libellant *vs.* Tug "Ira M. Hedges" her Engines etc. Certificate. Robinson, Biddle & Benedict, Procts. for Lbt., No. 79 Wall Street, Borough of Manhattan, New York City.

32 UNITED STATES OF AMERICA, *ss:*

By the Hon. George B. Adams, one of the Judges of the United States District Court for the Southern District of New York.

To Cornell Steamboat Company, Claimant of Steamtug "Ira M. Hedges," her engines, etc.:

Whereas the libellant, Lehigh Valley Railroad Company, has lately appealed to the Supreme Court of the United States from a final decree lately rendered by the District Court of the United States for the Southern District of New York, dismissing the libel herein, and has filed the security required by law; therefore

You are hereby cited to appear before the Supreme Court of the United States at Washington, on the 12th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of New York on the 19 day of June, in the year One thousand nine hundred and eight, and of the Independence of the United States the One hundred and thirty-second.

GEO. B. ADAMS,
Judge of the United States District Court.

Service of the foregoing citation is hereby admitted, this 24 day of June, 1908 without prejudice.

AMOS VAN ETTEN,
Proctor for Claimant.

33 [Endorsed:] U. S. District Court, Southern District of N. Y. Lehigh Valley Railroad Company Libellant *vs.* The Steamtug "Ira M. Hedges" her engines etc. Cornell Steamboat Company Claimant Citation O. Robinson, Biddle & Benedict, Proc-

tors for Libellant No. 79 Wall Street, Borough of Manhattan, New York City. U. S. District Court, S. D. of N. Y. Filed Jun- 22 1908. M.

34 [Endorsed:] 50-169 U. S. District Court, Southern District of New York. Lehigh Valley Railroad Company, Libelant, *vs.* The Steamtug Ira M. Hedges, her engines, &c., Respondent. Certificate of District Judge under Act of March 8, 1891, & Record.

Endorsed on cover: File No. 21,244. S. New York D. C. U. S. Term No. 448. Lehigh Valley Railroad Company, appellant, *vs.* Cornell Steamboat Company, claimant of steamtug "Ira M. Hedges," &c. Filed June 30, 1908. File No. 21,244.

United States Supreme Court,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD CO., Appellant, *vs.* CORNELL STEAMBOAT CO., Claimant, tug "*Ira M. Hedges*," etc., Appellee.	No. 448.

SIR:

PLEASE TAKE NOTICE, that, upon the record herein, a motion will be made at a session of this Court, to be held at Washington, D. C., on the 12th day of October, 1908, at twelve o'clock, noon, or as soon thereafter as counsel can be heard, to advance this cause on the docket of this Court, and to submit the same on that day, in conformity with Rule 32 of the Rules of the Supreme Court of the United States.

Dated New York, September 3, 1908.

Yours, &c.,
GEO. H. EMERSON,
of Counsel for Appellant,
Office and Post Office Address,
79 Wall Street,
New York City.

To AMOS VAN ETTEN, Esq.,
Proctor for Appellee.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD CO., Appellant, *vs.* CORNELL STEAMBOAT CO., Claimant of the tug "*Ira M. Hedges*," etc., Appellee.	No. 448.

Now comes the Lehigh Valley Railroad Co., the appellant, by George H. Emerson, of counsel, and moves this Court to advance this cause upon the docket of this Court and for an order that the same may be heard in conformity with Rule 32 of this Court, upon the ground that the District Court of the United States for the Southern District of New York erred in holding that:

The United States District Court, sitting as a Court of Admiralty, has no jurisdiction to enforce contribution between joint tort feasors where the common law remedy has been successfully invoked against the joint tort feasor seeking to enforce the contribution.

Certificate, folio 30, p. 14.

Statement.

On June 7, 1904, about 6:10 P. M., the tug *Slatington* with *Carfloat No. 22* in tow alongside on the port side, was standing over from the New York shore, heading about for Communipaw in New Jersey. The carfloat be-

longed to the libellant, and it was the charterer of the tug, manning and victualing her.

Libel, Record, fol. 2, p. 1.

At the same time the tug *Hedges*, with two sand scows in tow—one on each side—was proceeding up the river, about the centre thereof. The sand scows and tug belonged to different owners.

Libel, Record, fol. 3, pp. 1, 2.

The *Slatington* blew a signal of one whistle, which was not answered. Then seeing that there was no change of course or speed on the part of the *Hedges*, the *Slatington* stopped, blew alarm whistles and backed.

Libel, Record, fol. 3, pp. 1, 2.

The *Hedges* came on, and brought the starboard corner of the scow *Helen*—the starboard boat of the *Hedges* tow—into collision with the port corner of the carfloat.

Libel, Record, fol, 3, p. 2.

Thereafter the owner of the *Helen* sued the libellant in the Supreme Court of New York, Rockland County. The cause came on for trial before Mr. Justice Kelly and a jury, and a verdict was rendered for this libellant.

Libel, Record, fol. 3, p. 2.

The case was then appealed, and the Appellate Division reversed, on the ground that the trial justice had instructed the jury that the scow *Helen* could not recover if the tug *Hedges* had been guilty of fault.

The Appellate Division saying:

> "There was some evidence in the case tending to show that the accident was in part due to the negligence of the tug 'Hedges,' and the learned Court, in its charge to the jury, said: 'I submit the question of negligence to you, whether the 'Hedges' was

guilty of contributory negligence as matter of fact,' and 'I charge you as matter of law that, if the master of the tug 'Hedges' was careless, the plaintiff here is charged with that carelessness. If the master of the tug 'Hedges,' in navigating this boat on that day, was guilty of carelessness, that justifies you in holding the plaintiff guilty of contributory negligence'; and 'no matter if he (the master of 'Slatington') was careless, if both were careless, the verdict must also be for the defendant.' By request the Court also charged that 'if the jury find that the tug 'Ira M. Hedges,' or the persons in command of such tug, were guilty of negligence which in any way contributed to the collision, the plaintiff cannot recover.' The plaintiff excepted to the charge in this respect, and we are to consider whether, under the circumstances, this was a correct exposition of the law.''

Rockland Lake Trap Rock Co. vs. the *Lehigh Valley R.R. Co.*, 115 App. Div., 628, at p. 629.

Upon a new trial a verdict was found against this libellant, judgment was entered, and this judgment has been paid.

Libel, Record, fol. 4, p. 2.

The libellant seeks by this libel to enforce contribution against the *Hedges*, which, it claims, was a joint tort feasor.

Libel, Record, fols. 4, 5, p. 2.

The claimant of the *Hedges* excepted to the libel on the ground

(1) That it does not state a cause of action.

(2) That the Court has no jurisdiction.

Exceptions, Record, fol. 8, p. 3.

The Court sustained the exception to the jurisdiction, and from this ruling the libellant now prosecutes this appeal.

Certificate, Record, fol. 30, p. 14.

FIRST POINT.

There is no method under the New York Code by which one joint tort feasor, defendant in an action, can implead another joint tort feasor as a defendant; nor, if there were, could libellant have compelled the payment by the claimant in the courts of New York of any part of a joint judgment.

We do not consider that the question of whether or not one joint tort feasor can implead another as defendant under the New York Code has really any great bearing upon the merits, because even if such were the case the libellant's right to contribution would not thereby be defeated, as we shall hereafter show in this brief; but as the question was considered at some length in the District Judge's opinion, and seems to have perhaps affected the result, the Court saying (fol. 16, p. 8):

> "It seems to be an injustice that the *Hedges*, or her owner, if she was in fault, as alleged, should not respond for a part of the loss, but the libellant failed to resort to means which the State law provides for bringing in the other defendant, and I do not think it is now in a position to invoke the jurisdiction of this Court to enforce contribution,"

we shall discuss it very briefly.

The fallacy in the District Judge's opinion on this point lies in the fact that he has accepted the case of *Gittleman* vs. *Feltman*, 191 N. Y., 205, as holding that a joint tort feasor defendant can implead another joint tort feasor as defendant, whereas all that case holds is that a *plaintiff* may so amend his pleadings as to bring in another tort feasor as defendant: an entirely different

proposition from one joint tort feasor impleading another as *defendant*.

The rule that one joint feasor can not implead another *as defendant* has been settled for many years in New York.

Chapman vs. *Forbes*, 123 N. Y., 532.
Bauer vs. *Dewey*, 166 N. Y., 402.

In the latter case the New York Court of Appeals, speaking of the former case, said at p. 405:

> "Moreover, it is evident that the Court had no intention of overruling or modifying it, or to hold otherwise than that in an action at law, where the plaintiff seeks a money judgment only, he cannot be compelled to bring in parties other than those he has chosen."

But even were the rule otherwise, the libellant would have been no better off had it caused the respondent to be made a party to the action at law. For assuming that a judgment had been rendered against both defendants, the libellant would have had no right to compel the plaintiff to enforce its judgment, or any part of it, against its co-defendant; nor could it, after it had satisfied the whole judgment, have procured any contribution in the Courts of New York from its joint judgment debtor.

SECOND POINT.

The fact that one of the parties injured by the collision elected to proceed at common law can not defeat the libellant's right to contribution—a right recognized by the Admiralty Law, and brought into existence the very moment the wrong is committed.

The District Judge denied jurisdiction on the ground that one of the parties having invoked the common law remedy, the result in that action was conclusive, and there being no right of contribution at common law between joint tort feasors, the District Court sitting as a Court of Admiralty would not enforce contribution where the common law remedy has been invoked.

That the right of contribution exists in admiralty is admitted, but the District Judge holds that the owner of the *Helen* having seen fit to pursue the common law remedy, the libellant cannot enforce contribution in admiralty.

On the argument below much weight was laid by counsel for the *Hedges* upon the fact that the owner of the *Helen* had taken his chances in a common law action where contributory negligence bars a recovery. But we cannot see how that has any bearing. The owner of the *Helen* was perfectly safe in pursuing the common law remedy because his boat was in tow, and was free from any negligence.

The same attorney represented the *Helen* in that action that represents the *Hedges* here, and he saw to it that the owner of the *Hedges* took no chances in the common law action by not making the claimant a party defendant in that action, well knowing that the

libellant here could not implead the claimant in that action.

The owner of the *Helen* could have proceeded in the common law action against this libellant or against both the libellant and the owner of the *Hedges*. Simply because the owner of the *Helen*, an innocent party, chooses to bring his action at common law against one of the joint tort feasors should not bar the libellant's right to contribution.

It was argued on the trial that the libellant is suing upon a judgment. That such is not the case is clearly shown by the fact that the libel (fol. 4, p. 2) sets forth not only the amount of the judgment, but also the legal expenses and claims for contribution to both.

The libel (fol. 4, p. 2) alleges the collision was caused or contributed to by the negligence of the *Hedges*, and the prayer in part is:

"* * * That the said steam tug, etc , may be seized and sold to pay the amount of the claim set forth in this libel * * *"

We are suing for contribution, and the amount of the judgment is set forth as part of the damages we have sustained, and as part of the amount to which the *Hedges*, if she is found, upon a trial, to be a joint tort feasor, should contribute.

The right of contribution in admiralty merely means that one of the joint tort feasors is bound to indemnify the other for his portion of the damages that the latter may have been compelled to pay. It is very much like a case in which one party has to pay a judgment or makes a compromise settlement, and then looks to his indemnitor for payment. The judgment or the amount paid in settlement is not conclusive upon the right of the party to recover from his indemnitor, but if the indemnitor is sued, then the amount of the judgment paid or the

amount paid in settlement is, in the event he is held liable, conclusive upon the indemnitor.

Therefore, in this case, the judgment in the action between the owner of the scow *Helen* and the libellant does not fix the liability of the owner of the *Hedges*. That must be established by a trial upon the merits. But if the owner of the *Hedges* is found upon a trial at fault and therefore bound to contribute, then the judgment in the case of the owner of the *Helen* against the libellant is conclusive as to the amount that the libellant has been caused to pay on account of the joint tort of itself and the *Hedges*, and the *Hedges* must pay one-half of that judgment, and other expenses.

There can be no doubt that the right of contribution exists in admiralty.

The first cause in which the right to contribution was decreed was a case in which the owner of the barge *Helena* filed a libel against the steamers *Jay Gould* and *Mariska*. The *Jay Gould* was arrested, but the *Mariska* was not arrested, because not found in the jurisdiction.

The case proceeded against the *Jay Gould*, and there was a decree entered against her.

Thereafter the owner of the *Jay Gould* filed a libel against the *Mariska* for contribution for one-half of the amount paid by it under the final decree in the first suit, and the legal expenses of the defense.

The owner of the *Mariska* excepted to the libel. The exceptions were sustained by the District Court, and the libel was dismissed.

The Mariska, 100 Fed. Rep., 500.

On appeal the decree of the District Court was reversed (107 Fed. Rep., 989), the Court in its opinion saying (at pp. 991, 992):

> "Here, if both vessels at fault be impleaded, the libellant has a decree not *in solido* against both for

the full amount of his damage, with right of execution in full against one, but a decree for a 'moiety of damages against each vessel, with an alternative right of recourse against either for so much of the moiety adjudged to be paid by the other as he is unable to collect from the latter.' (The Alabama, 92 U. S., 695); and, pursuing but one of the offending vessels, he is entitled to a decree for the whole amount of his damage (The Atlas, 93 U. S., 302; the Juniata, 93 U. S., 337). In the latter case it was remarked that the rights of the claimant of one vessel mulcted in the full amount of the damage against the vessel contributing to the wrong could not be determined in the proceeding, such vessel not being a party thereto. The remark, at the most, is merely suggestive of the opinion of the writer that a remedy exists. The right of contribution in such case has been recognized, as we think, by the courts permitting one vessel in fault paying damages to recoup one-half the damages paid from an amount adjudged to another vessel also in fault. The Hercules, 20 Fed. Rep., 205, and authorities cited; The Job T. Wilson (D. C.), 84 Fed. Rep., 204. In these cases, however, all parties in fault were before the Court. The fundamental, equitable principle is to equalize the burden among those who should bear it. The North Star, 106 U. S., 17. The supposed difficulty arises only when one of the offending vessels is not a party to the proceeding in which fault is adjudged. In such case it is not possible for the Court to adjust the equities, or to decree contribution. Does the right of contribution therefore fail? Can it be that the law is incapable to furnish a remedy for a recognized right? Will it be permitted, as at the common law, to one injured by the wrong of two or more to hold one for the injury and to absolve the others? We cannot think the courts of admiralty are so weak and so limited in power that they cannot find means to enforce a recognized right."

And in speaking of the reason for the 59th Rule, the Court at p. 992 said:

"This rule was declared as, we think, in manifest recognition of the right of contribution and to enable the courts of admiralty to impose the burden of loss upon all by whom the burden should be borne. The rule did not and could not create a right of contribution. It recognized the right as pre-existing, and to enforce that right declared a practice by which the recognized right might be enforced by the respondent in the proceeding instituted by one injured by the wrong of two or more vessels, so that before payment and in promotion of justice and for the speedy and complete determination of right, contribution should be decreed. It is not doubted that under this rule, if the 'Mariska' had been arrested and impleaded in the proceeding by the owners of the 'Helena,' the court would have decreed the fault of the former—if she was at fault—and have equalized the burden as between the 'Jay Gould' and the 'Mariska,' and have decreed contribution. But the latter vessel was without the jurisdiction, and could not, therefore, be brought in. Does the right of contribution, therefore, fail? Is the right dependent upon the accident of the locality of the vessel at the time of the proceeding? May not the owners of the 'Jay Gould,' having paid the amount decreed, proceed independently against the 'Mariska'? * * * * We find no case in which the direct question presented to us here has been determined; but the analogies of the law and the fundamental principles of right point clearly, as we think, to the conclusion that, if fault be established upon the part of the 'Mariska,' she should in this proceeding be compelled to bear her proportion of the burden which the wrong imposes. The decree against the 'Jay Gould' does not bind the 'Mariska,' nor is she entitled to the benefit of it, being not a party to the proceeding. As to her, the whole matter is at large; and it will be incumbent upon the appellant here to prove the fault charged. The decree is of moment to establish the fact of compulsory payment of damages by the 'Jay Gould.'"

As the Court said, the 59th Rule did not create the right of contribution, but merely recognized the right as pre-existing, and established a means by which it could be easily enforced. The right to enforce contribution does not fail merely because one of the guilty vessels is out of the jurisdiction. It is not dependent upon the accident of locality, nor should it be dependent upon the mere fact that one of the parties sees fit to pursue the common law remedy.

The right is not given by the form of remedy pursued, but is created by the wrong, and being of admiralty origin may be, and should be, recognized in admiralty so long as it remains unsatisfied.

This Court, speaking by Mr. Justice Holmes, has said:

> "The respondent set up three defenses below and here. It argued that there was no jurisdiction in admiralty over the claim in its present form; that the petitioner had no case upon the merits, and that it was concluded by the former decree. The Circuit Court of Appeals decided against the first two points before sustaining the third. We shall take them up in their order. The jurisdiction appears to us tolerably plain. If it be assumed that the right to contribution is an incident of the joint liability in admiralty and is not *res judicata*, it would be a mere historical anomaly if the admiralty courts were not free to work out their own system and to finish the adjustment of maritime rights and liabilities. Indeed we imagine that this would not have been denied very strenuously had the question been raised by proper pleadings in connection with the original suit. But if the right is not barred by the former decree, it would be still more anomalous to send the parties to a different tribunal to secure that right at this stage. For the decree was correct as far as it went, and, by the hypothesis, might stop where it did without impairing the claim to contribution. *That claim is of admiralty origin, and must be satisfied before complete justice is done.* (Italics ours.) It cannot

be that because the admiralty has carried out a part of its theory of justice, it is prevented by that fact alone from carrying out the rest. See The Mariska, 107 Fed. Rep., 989. On the merits, also, we have no great difficulty. The rule of common law, even that there is no contribution between wrongdoers, is subject to exception. Pollock Torts, 7th Ed., 195, 196. Whatever its origin, the admiralty rule in this country is well known to be the other way. The North Star, 106 U. S., 17; The Sterling and The Equator, 106 U. S., 647; Admiralty Rule 59."

Erie Railroad Co. vs. *Erie Transp. Co.*, 204 U. S., 220, at p. 225.

The Lower Court meets these decisions by saying that they involve cases originally arising in admiralty, and holds that by one of the parties (the innocent one, of course) proceeding at common law, this right given by the admiralty can be defeated.

We cannot possibly understand how any such position can be sustained. If the right of contribution exists at all, it exists from the very moment of the collision, being brought into existence by the collision, and it cannot be defeated or impaired simply because one of the parties elects to proceed in the common law forum.

Here the owner of the scow *Helen* could have proceeded either in admiralty or at common law, and in neither case would he have taken any risks, because he was an innocent party, his scow being absolutely under the control of the tug *Hedges*.

Simply because the owner of the *Helen* elected to proceed at common law against the libellant alone, cannot, and should not, defeat the libellant's right to proceed in admiralty against the *Hedges* for contribution after the owner of the *Helen* secures a common law judgment.

The procedure to enforce the right of contribution after a common law judgment is no different from the procedure

for contribution after a decree in admiralty. The common law judgment does no more and no less that what the decree in admiralty does—*i. e.*, it establishes the fact of compulsory payment of the damages.

The Mariska, 107 Fed. Rep., 989, at p. 993.

Suppose the owner of the *Helen* had proceeded in admiralty. He might have proceeded against both the *Hedges* and the libellant or against the libellant alone, as he did in the common law action. If he had proceeded against the libellant alone, the libellant could have done either one of two things. It could have impleaded the *Hedges* under the 59th Rule (something it could not do in the common law action), or, if the *Hedges* were out of the jurisdiction, or it was not desired to implead her, it could have defended the action to final decree, and then filed a libel for contribution.

The Mariska (*supra*).

If the libellant could have allowed the action, had it been brought in admiralty, to go to final decree without impleading the *Hedges*, and yet thereafter have enforced the right of contribution, why should it be barred from enforcing the right brought into existence by the collision, merely because the owner of the *Helen* saw fit to enforce his remedy by proceeding at common law against the libellant alone and so making it impossible for the libellant to implead the owner of the *Hedges?*

It must be remembered that this is not a case where the libellant is estopped by its election of the remedy, because it had nothing to say with regard to what remedy should be pursued.

The case would be different had the *Hedges* sued at common law for damages incident to a collision. Then the *Hedges* would have taken the chances of contributory negligence barring a recovery, and the final judgment

would then have been *res adjudicata* as to the *Hedges'* negligence. But here the negligence of the *Hedges* was never adjudicated. Counsel on argument below stated that the trial Court in the action between libellant and the owners of the scow *Helen* on the second trial instructed the jury as the Court did on the first trial, *i. e.*, that if the *Hedges* were guilty of negligence recovery was barred; but it is impossible to see how any Court could have given such instructions in the face of the Appellate Division opinion, and even if such instructions were given, that fact should not bar the right of contribution in this action.

As to the judgment in the common law action being *res adjudicata,* we think the opinion of this Court in the case of the *Erie Railroad Co.* vs. *the Erie Transportation Co.* (204 U. S., p. 220), shows clearly that this is not true. This Court said in that case, at p. 227:

> "If we are right, then this is a strong case for holding that the petitioner is not barred. It stands adjudicated that its pleadings did not open its present claim. They could not have done so because at that stage the petitioner, not having paid, it had no claim for indemnity, but only for exoneration. It was not bound to adopt the procedure permitted to it by Rule 59. It did ask leave to amend so as to protect its rights, but was met by the argument of the respondent and the opinion of the Circuit Court of Appeals that it could bring a new suit. This Court said the same thing in affirming the decree against The New York: 'If as between her and the "Conemaugh" she have a claim for recoupment, the way is open to recover it,' 189 U. S., 368. The same proposition was implied in The Juniata, 93 U. S., 337, 340."

In the case of The Juniata (*supra*), this Court said, at page 340:

> "We should adjudge that half the amount should be paid by the tug and the other half by the steamer,

but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offence being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damage. The Atlas (*supra*), p. 302. The decree must therefore be changed so as to require full payment to be made to the United States by the claimants of the 'Juniata.' Whatever their rights may be as against Pursglove by reason of such payment of more than one-half must be settled in another proceeding. It cannot be done in this litigation."

If the right of contribution in admiralty can be defeated by the innocent party selecting his forum, then grave injustice may be done, something that admiralty, like equity, abhors. Take for illustration a collision case in which both ships are at fault and in which cargo on one of the ships is damaged. Assume that the facts of the collision were such the vessel carrying the damaged cargo could not take advantage of the Harter Act and that the cargo and the ship in which it is carried are represented by the same proctor, as is the case here with the *Helen* and *Hedges*. All that would be necessary to be done to relieve the vessel carrying the damaged cargo from all liability would be for the proctor to proceed at common law against the other vessel alone for the damage to the cargo. That vessel could not implead the vessel carrying the cargo, and, after judgment was entered, it could not, if the right of contribution is denied in such a case as this, proceed in admiralty for contribution. Such injustice should not be permitted.

The saving to the suitor of the common law remedy does not mean that under its guise a gross injustice may be done, and that admiralty shall be deprived of enforcing a right which it recognizes.

If, then, we are correct in our view that the right of contribution exists in admiralty from the moment the wrong

is committed and is not dependent upon the form of procedure any more than it is dependent upon the locality of the vessels at the time the action is brought, then the exception to the libel on the ground that the Court had not jurisdiction should have been overruled.

As to the exception that the libel does not state a cause of action, it is evident that if there is a right of contribution, the libel sets forth all the facts sufficient to constitute a cause of action. It sets forth facts concerning the collision which show clearly that the *Hedges* was at fault in that she was the burdened vessel and did not keep out of the way. It shows that the libellant, by reason of the collision, has been forced to pay to a third party all the damages sustained by such third party by reason of the collision. It therefore sets forth clearly a cause of action for contribution in admiralty.

THIRD POINT.

The decree should be reversed, with costs, and the cause remanded to the District Court with instructions that the exceptions be overruled, the claimant allowed to answer, and the action proceed to trial on the merits.

Respectfully submitted,

GEO. H. EMERSON,
Proctor for Appellant.

WILLIAM S. MONTGOMERY,
Of Counsel.